In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1295

DIEGO BOTERO AND ROBERT DENNIS CANTALUPO,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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Petitioners DIEGO BOTERO and ROBERT DENNIS CANTALUPO pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered November 9, 1978, affirming their convictions under 21 U.S.C. §§ 952(a), 960 and 963; 21 U.S.C. § 952(a); and 21 U.S.C. § 84(a)(1), and that on hearing the judgments of conviction be reversed.

OPINIONS BELOW

The opinion of the Court of Appeals, which is scheduled for publication but not yet published, dated November 9, 1978, is Appendix "A" to this petition. On December 29, 1978, the Court of Appeals, *sua sponte*, deleted one sentence from the opinion. This order is Appendix "B" to this petition. The pertinent District Court orders were by minute order and unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 9, 1978. Petitioners' timely motion for reahearing and rehearing *en banc* was denied on January 22, 1979. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does the Fourth Amendment permit the warrantless, non-exigent use of an electronic "beeper" to monitor activities inside a residence?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV, provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On September 29, 1977, a shipment of leather handbags from Columbia, South America, to a Sunnyvale, California firm, arrived at San Francisco International Airport. A lawful Customs search revealed a total of nine pounds of cocaine in the hollowed out ends of eighteen of the one hundred handbags. Drug Enforcement Administration Agents prepared the shipment for controlled delivery. They kept one hollowed out bags for evidence. Four bags continued to contain cocaine. In one of the seventeen bags that no longer contained cocaine, agents placed an "AR-4" transmitter, which emits a continued tone to allow tracking,

and which changes tone when the parcel is opened. Another "AR-4" transmitter was placed in the large carton containing the suspect bags. Several days later, on October 5, 1977, the agents arranged for petitioner Botero to be notified his shipment was ready for delivery.

Botero picked up the bags, went to nearby Burlingame, where he picked up two associates not parties to this appeal, and proceeded to petitioner Cantalupo's apartment in nearby San Carlos. The four took the shipment into Cantalupo's apartment. Soon thereafter the beepers changed tone, indicating the shipment had been opened. Cantalupo then left the apartment and was arrested at a grocery next door. Then the agents went to the apartment and knocked on the door. Botero answered and was placed under arrest. Inside, the agents saw ripped open handbags and placed the other two under arrest. They "secured" the premises and applied for a search warrant for the apartment.

The affidavit in support of the search warrant recited the above chronology but completely omitted any reference to the beepers, making the timing of the arrest, which enabled the *flagrante delicto* view of the apartment interior, appear fortuitous.

Petitioners moved under Rule 41, Federal Rules of Criminal Procedure, to suppress all observations of Defendants among opened handbags, reasoning that without the information conveyed by the beepers, the agents would not have dared act when they did, and urging that two opportunities for antecedent judicial authorization, a warrant for the beepers or a warrant for Botero's arrest, had been bypassed. Petitioners further moved to suppress additional

incriminating evidence seized pursuant to the warrant, urging this was the appropriate remedy for the misleading search warrant affidavit. The Rule 41 motion was denied in its entirety and Petitioners were ultimately found guilty of various counts on the basis of a stipulated statement of facts. Each Petitioner was sentenced to five years, with a three year special parole.

Petitioners renewed their contentions in the Court of Appeals. After the opinion was rendered stating that the search warrant affidavit did mention the role of the beepers, Petitioners applied for a rehearing, pointing out that the search warrant affidavit was indeed silent on the use and role of the beepers, and that it was the affidavit in support of complaint, filed by a different agent and after the execution of the search warrant, that mentioned the beepers. The Court did not mention this problem in the order denying rehearing.

REASONS FOR ALLOWANCE OF THE WRIT

It is respectfully submitted that the guidance of this Court is required to determine how to square the official use of such electronic gadgetry with the Fourth Amendment. In this regard, conflict among the Circuits has been the hallmark. For example, with respect to the use of such devices to follow vehicles in public, at least three views have emerged. The Ninth Circuit, in *United States v. Hufford,* 539 F.2d 32, *cert. denied,* 429 U.S. 1002 (1976), held such use outside the warrant requirement, reasoning that: (1) one knowingly exposes to the public his whereabouts on the public roads and he therefore has no reasonable expectation of privacy as to those whereabouts; (2) one has a

lessened expectation of privacy with respect to a vehicle, the function of which is transportation, not a repository of personal effects or a residence; and (3) the beeper merely augments agents' ability to see what they have a right to see anyway. This view was affirmed in *United States v. Pretzinger,* 542 F.2d 517 (9th Cir., 1976), (in which a warrant was obtained and the Court approved that practice), and, reluctantly, in *United States v. Curtis,* 562 F.2d 1153 (9th Cir., 1977). The Fifth Circuit holds this use is a search requiring a warrant. *United States v. Holmes,* 537 F.2d 227 (1976). The First Circuit holds that, at least where the duration is slight, no warrant is required where probable cause exists. *United States v. Moore,* 562 F.2d 106 (1977), *cert. denied sub. nom. Bobisink v. United States,* 435 U.S. 926 (1978).

As to monitoring activities inside a residence, however, at the time Petitioners filed their suppression motion, there appeared to be, and we urged there was, unanimity that a warrant was required. *United States v. Moore, supra,* held that because of the enhanced expectation of privacy in a residence, a functional approach requires a warrant in that instance. A few days before the oral argument in the Ninth Circuit in this case, that Court decided *United States v. Dubrofsky,* 581 F.2d 208 (1978). Although the case did involve monitoring activities in a house, the facts were peculiar. The house did not belong to Dubrofsky and he was in a cellar that had been locked from the outside. The issue was not briefed, and the Court did not directly address the in-public/in-private distinction, but the Court held that the warrant requirement did not apply. In the instant case, the Court again did not discuss the issue, holding merely

that in *Dubrofsky* the matter had "been laid to rest." It is respectfully submitted that in an area of ever-increasing use of electronic surveillance techniques, that is no way to lay such an important issue to rest.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should issue.

Respectfully submitted,

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MICHAEL STEPANIAN
Attorney for Petitioner
Robert Dennis Cantalupo

(Appendices Follow)

Appendices

United States Court of Appeals
for the Ninth Circuit

United States of America, Plaintiff, Appellee, vs. Diego Botero, Defendant-Appellant.	No. 78-1413
United States of America, Plaintiff-Appellee, vs. Robert Dennis Cantalupo, Defendant-Appellant.	No. 78-1414

[December 29, 1978]

Before: TRASK and SNEED, Circuit Judges, and
CRAIG,* District Judge

ORDER

The panel in the above case sua sponte herewith deletes from the opinion the last sentence of Part II (Slip Opinion at 3657) as follows:

> "One who deals in contraband cannot expect Fourth Amendment rights to protect his privacy in the same manner as one who deals in legitimate merchandise. *United States v. Pringle,* 576 F.2d 1114, 1119 (5th Cir. 1978); *United States v. Perez,* 526 F.2d 853, 863 (5th Cir. 1975), *cert. denied,* 429 U.S. 846, 97 S.Ct. 129, 50 L.Ed.2d 118 (1976); *United States v. Moore,* 562 F.2d 106, 111 (1st Cir. 1977); *United States v. Emery,* 541 F.2d 887, 889-90 (1st Cir. 1976)."

OZELL M. TRACK
United States Circuit Court

*Honorable Walter Early Craig, Chief Judge for the District of Arizona, sitting by designation.

United States Court of Appeals
for the Ninth Circuit

United States of America, Plaintiff, Appellee, vs. Diego Botero, Defendant-Appellant.	No. 78-1413
United States of America, Plaintiff-Appellee, vs. Robert Dennis Cantalupo, Defendant-Appellant.	No. 78-1414

[November 9, 1978]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: TRASK and SNEED, Circuit Judges, and
CRAIG,* District Judge

CRAIG, District Judge.

Appellants Diego Botero and Robert Dennis Cantalupo, based on a stipulated Statement of Facts, submitted to the District Court following waiver of jury trial, were found guilty of conspiracy to import cocaine, 21 U.S.C. § 952(a), 960 and 963; importation of cocaine, 21 U.S.C. § 952(a), and possession of cocaine with intent to distribute, 21 U.S.C. § 841(a)(1). Each was sentenced to a five-year

*The Honorable Walter Early Craig, Chief Judge for the District of Arizona, sitting by designation.

prison term with a three-year special parole term. Appellants bring this appeal challenging the use of an electronic tracking device, a warrantless entry into an apartment to make an arrest, the validity of an affidavit supporting a request for a search warrant, and the use of Appellant Cantalupo's post-arrest statements, the latter assertedly in violation of *Miranda*. We affirm the conviction.

I. FACTS

On September 29, 1977 a shipment of leather handbags, sent from Colombia, S. A. to "South American Imports," Sunnyvale, California, arrived at the San Francisco International Airport. A lawful Customs search revealed approximately nine pounds of cocaine hidden in secret compartments of the handbags. The shipment was prepared for controlled delivery by Drug Enforcement Administration (DEA) agents and two electronic surveillance devices were placed inside the packages. The devices inserted emitted beeping signals that allowed agents to track the parcels. The beep emitted by the devices changed tone when the parcels were opened. In addition to the electronic devices a fluorescent powder, resembling cocaine, was inserted in each of the false compartments of the handbags. The bags and shipment were then resealed for delivery.

On October 5, 1977 Appellant Diego Botero, of South American Imports, was advised that his shipment of leather handbags had arrived and been cleared by Customs. Drug Enforcement Administration agents observed Botero accept delivery and followed him to Burlingame, California where Botero met two co-defendants, not parties to this

appeal. Botero and his two associates were observed to proceed to a San Carlos, California apartment building, arriving at approximately 5:15 p.m. The shipment was carried into Apartment No. 2 and at 5:25 p.m. the DEA agents received a change of tone from the beepers, indicating that the shipment had been opened. Within five minutes Appellant Robert Cantalupo emerged from the apartment and was arrested by DEA agents who followed him to a nearby grocery store. The agents returned to the apartment, knocked on the door, and arrested Appellant Botero in the doorway as he opened the door. The agents then entered the apartment and observed leather handbags, many with the compartments opened and in disarray about the living room. The two associates of Botero, present in the apartment, were then arrested.

The four prisoners were removed to the San Carlos police department. A black light examination disclosed that all four prisoners were marked with the fluorescent powder.

After being informed of his *Miranda* rights, Cantalupo was questioned by a DEA agent. Cantalupo disclosed that he knew the leather bags contained cocaine, thought the shipment contained approximately one kilogram of cocaine, and that his share of the profits would be in the neighborhood of $10,000 plus what he might earn from additional selling. The period of interrogation lasted about 45 minutes and terminated when Cantalupo refused to detail his remarks for written or electronic transcription until he could consult with an attorney. During the interview, on several occasions, Cantalupo requested and was refused permission to call his girlfriend. The interrogating officer believed that

the request was for the purpose of arranging bail for Cantalupo.

Later, on the same evening, a search warrant was issued to search the apartment at which the shipment was delivered and which was found to be Cantalupo's apartment. A search was conducted the following day. Leather handbags, cocaine, narcotics paraphenalia, cartons from the controlled delivery and identification papers were discovered and seized. Botero and Cantalupo were indicted by a grand jury on October 12, 1977. Motions to suppress were heard and denied November 18, 1977 and, on the stipulated Statement of Facts following waiver of a jury trial, the appellants were convicted by the court on January 3, 1978. The appellants assert four grounds for reversal on their appeal:

1. Warrantless installation and use of electronic surveillance devices violated Appellants' Fourth Amendment rights.

2. The warrantless entry into the apartment, and arresting Botero as he opened the door, violated the Fourth Amendment.

3. The affidavit supporting the post-arrest warrant request to search Cantalupo's apartment was invalid because of the failure to disclose the use of the beepers.

4. Cantalupo's in-custody statements should have been suppressed because of a failure to comply with the *Miranda* warnings.

II. INSTALLATION AND USE OF THE ELECTRONIC SURVEILLANCE DEVICES

The initial opening of the shipment by Customs agents was lawful. Customs officials are authorized to inspect incoming international shipments when they have a "reasonable cause to suspect" that the shipment contains contraband. *U. S. v. Ramsey,* 431 U.S. 606, 97 S.Ct. 1972. *U. S. v. Dubrofsky,* 77-3738 (9th Cir. Aug. 9, 1978), ... F2d ..... The issue of installation and use of electronic surveillance devices (beepers) and Fourth Amendment consequences has been laid to rest by *Dubrofsky,* supra. One who deals in contraband cannot expect Fourth Amendment rights to protect his privacy in the same manner as one who deals in legitimate merchandise. *United States v. Pringle,* 576 F.2d 1114, 1119 (5th Cir. 1978); *United States v. Perez,* 526 F.2d 859, 863 (5th Cir. 1975), *cert. denied,* 429 U.S. 846 (1976); *United States v. Moore,* 562 F.2d 106, 111 (1st Cir. 1977); *United States v. Emery,* 541 F.2d 887, 889-890 (1st Cir. 1976).

III. BOTERO'S ARREST

Botero asserts his arrest was improper because it occurred without a warrant in a private home. The agreed Statement of Facts discloses "in response to (the agent's) knock, the door was opened by defendant Botero. He was placed under arrest at that time." The arresting officers were not required to enter the apartment in order to place Botero under arrest. Therefore, the issue of a warrantless entry into the apartment to arrest Botero is not before us. Moreover, in *U. S. v. Santana,* 427 U. S. 38 (1976), it was held that a defendant standing in a doorway cannot divert an arrest by retreating into the house. The *Santana* court

considered the doorway to be a public place. Thus, even if the arresting officers followed Botero into the apartment to arrest him, the entry was proper under *Santana*. In addition, had the arresting officers actually entered the apartment to arrest Botero, the arrest would still have been a valid one under the exigency of the circumstances which justified the warrantless entry to make the arrest. *U. S. v. McLaughlin,* 525 F.2d 517 (9th Cir. 1975). It is obvious that, had the arrests not taken place as they did, the contraband under surveillance would have been in imminent danger of removal or destruction. *U. S. v. Fleckinger,* 573 F.2d, 1349 (9th Cir. 1978). Moreover, in the instant case, the agents did not conduct a search nor seize any evidence in the apartment incident to the arrest. In this respect, the arresting officers disclosed considerable restraint in securing the apartment and awaiting the issuance of a search warrant.

IV. THE AFFIDAVIT SUPPORTING THE POST-ARREST SEARCH WARRANT

Appellants assert that the evidence seized in the apartment should have been suppressed because the affidavit in support of the search warrant did not disclose the use of electronic tracking devices. In fact, the affidavit does mention the use of the electronic devices (Tr. at 149, 150). Moreover, omissions or misstatements in a search warrant affidavit, although negligent, are fatal only if reckless and made with intent to deceive the court. Omissions or misstatements resulting from negligence or good faith mistakes will not invalidate an affidavit which on its face establishes probable cause. *Franks v. Delaware,* ___ U.S. ___, 98 S.Ct. 2674 (1978). *Cf. United States v. Hole,* 564 F.2d 298 (9th

Cir. 1977); *U. S. v. Damitz,* 495 F.2d 50 (9th Cir. 1974); *U. S. vs. Carmichael,* 489 F.2d 983 (7th Cir. 1973); *U. S. vs. Marihart,* 492 F.2d 897 (8th Cir. 1974), *cert. denied* 419 U.S. 827 (1974). There is no evidence in the record of bad faith by DEA agents for the purpose of deceiving the court by omitting the detail of the use of the beepers. The affivavit, in reciting the circumstances leading to Appellants' arrest, readily establishes probable cause to search the apartment for the items designated. The search warrant was validly issued.

V. CANTALUPO'S IN-CUSTODY STATEMENTS

The final position of Appellants is that Cantalupo's statements to the DEA agent following arrest should be suppressed because the agent denied Cantalupo's request to call his girlfriend. Appellants assert, contrary to the agent's understanding, that the purpose of the call was to have Cantalupo's girfriend obtain an attorney for him. At the suppression hearing on this issue it was found that Cantalupo gave a knowing and voluntary waiver of his *Miranda* rights when he made the statements. It is the rule of this court, and generally; that Findings of Fact made at a suppression hearing will not be disturbed on appeal unless "clearly erroneous." *U. S. v. Chose,* 503 F.2d 571 (9th Cir. 1974), *cert. denied* 420 U.S. 948 (1975); *U. S. v. Welp,* 469 F.2d 688 (9th Cir. 1972); *Campbell v. U.S.,* 373 U.S. 487, 493 (1963). There is nothing in the record in this case to indicate that the findings by the district court at the conclusion of the suppression hearing were "clearly er-

roneous." From the evidence before him, and from the record before this Court, there is nothing to indicate that the district court finding was other than proper.

The convictions are affirmed.

AFFIRMED.

No. 78-1295

In the Supreme Court of the United States

OCTOBER TERM, 1978

DIEGO BOTERO and ROBERT DENNIS CANTALUPO,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B-1 to B-8) is reported at 589 F. 2d 430.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1978. A petition for rehearing was denied on January 22, 1979. The petition for a writ of certiorari was filed on February 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the warrantless use of electronic tracking devices ("beepers") in this case violated petitioners' Fourth Amendment rights.

STATEMENT

Following a non-jury trial in the United States District Court for the Northern District of California, petitioners were convicted of conspiracy to import cocaine, importing cocaine, and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 952(a), 960, 963, and 841(a)(1). Each was sentenced to five years' imprisonment, to be followed by a three-year special parole term. The court of appeals affirmed (Pet. App. B-1 to B-8).

The evidence at trial, set forth in a stipulated statement of facts, showed that on September 29, 1977, a shipment of leather handbags from Colombia arrived at the San Francisco International Airport addressed to petitioners, doing business as "South American Imports." A concededly legal Customs search revealed nine pounds of cocaine concealed in secret compartments of the handbags. Drug Enforcement Administration (DEA) agents placed two beepers inside the packages and resealed them. The devices were designed so that the tone of the signal that they emitted would change when the packages were opened (Pet. App. B-2).

On October 5, 1977, petitioner Botero was advised that his shipment had arrived and cleared Customs. DEA agents observed Botero accept the shipment and followed him to Burlingame, California, where he met two associates, and then to an apartment building in San Carlos, California (Pet. App. B-2 to B-3). The shipment was carried inside one of the apartments, and a few minutes later the signal transmitted by the beepers indicated that the packages had been opened. Shortly thereafter petitioner Cantalupo left the apartment and was arrested at a nearby grocery store. The agents returned to the apartment, knocked on the door, and arrested petitioner Botero when he came to

the door.[1] Inside, the agents saw a number of handbags strewn about, many of which had been ripped open. They secured the apartment until they obtained a warrant, at which time they searched it (Pet. App. B-3). They also searched the truck in which Botero had driven from the airport and seized shipping documents for the September 29 shipment (Appellants' Opening Br. 12-13).

An examination using black light disclosed that all four persons arrested were marked with fluorescent powder of a type that Customs agents had placed in the packages before resealing them. In addition, petitioner Cantalupo told DEA agents after his arrest that he knew that the packages contained cocaine and stated that he believed his share of the profits would be $10,000 or more (Pet. App. B-3).

ARGUMENT

1. Petitioners assert (Pet. 4-6) that the warrantless use of the beeper "to monitor[ ] activities inside a residence" violated their Fourth Amendment rights and that the courts of appeals, with the exception of the current decision, are unanimous in holding that a warrant is required to use a beeper inside a residence.

Contrary to petitioners' contentions, however, there is no conflict among the courts of appeals on the issue presented by this case. The Ninth Circuit in this case and in *United States* v. *Dubrofsky*, 581 F. 2d 208, 210-212 (1978), has taken the position that use of beepers, including beepers inserted in contraband during a Customs search, involves only a slight intrusion and accordingly does not require a warrant,

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[1] The two men whom petitioner Botero had picked up in Burlingame, Guillermo Valencia-Bravo and Javier Ospina-Bernal, were also arrested inside the apartment. Both men failed to appear for trial. A fifth co-defendant, Steven Ford, was tried separately by a jury and acquitted (Appellants' Opening Br. 1).

even when contraband is traced into a residence (581 F. 2d at 211). It views the beeper as "but another surveillance aid," like binoculars or radar, for which no warrant is required (*id.* at 211-212).

The other circuits that have considered the issue have likewise approved the use of beepers to trace contraband, even into residences, but have done so on a somewhat different ground. They conclude that one can have no legitimate expectation of privacy (see *Katz* v. *United States*, 389 U.S. 347, 351 (1967)) in contraband, since one has no right to possess it at all. See *United States* v. *Pringle*, 576 F. 2d 1114, 1118-1119 (5th Cir. 1978) (insertion of beepers in heroin during Customs search and subsequent tracing of shipment from car into house and then back to car is permissible); *United States* v. *Emery*, 541 F. 2d 887, 889-890 (1st Cir. 1976) (insertion of beeper in cocaine during Customs search and subsequent tracing of beeper into apartment is permissible). See also *United States* v. *Bishop*, 530 F. 2d 1156 (5th Cir.), cert. denied, 429 U.S. 848 (1976) (beeper placed in bait money); *United States* v. *Perez*, 526 F. 2d 859, 863 (5th Cir.), cert. denied, 429 U.S. 846 (1976) (beeper placed in item exchanged in heroin purchase). See also *Rakas* v. *Illinois*, No. 77-5781 (Dec. 5, 1978), slip op. 16 n.12.[2]

[2] *United States* v. *Moore*, 562 F. 2d 106, 110-114 (1st Cir. 1977), cert. denied, 435 U.S. 926 (1978), on which petitioners rely to demonstrate a conflict, is not to the contrary. The First Circuit there disapproved use of beepers to detect the presence in a residence of substances that were legally in the suspect's possession, but the court explicitly distinguished this use from placing beepers in contraband. It reaffirmed its earlier holding in *United States* v. *Emery*, *supra*, that "[t]he narcotics peddler in whose [narcotics] a beeper is planted has no privacy interest in the substance" since he "ha[s] no right to possess [it] at all." 562 F. 2d at 111.

Indeed, petitioners apparently do not contest the use of the beepers up to the point that the contraband entered the apartment,[3] but only their use to signal when the package was opened (see Pet. 3). But the agents' access to this additional modicum of information did not significantly increase the intrusion into petitioner's affairs. Unlike wiretaps or similar surveillance, it did not permit the agents to determine what petitioners were saying, and it did not tell them who was present or who opened the packages. It simply let them know that for one reason or another daylight had entered the boxes. See *United States* v. *Dubrofsky*, *supra*, 581 F. 2d at 211-212. Therefore, even though the information was gathered from inside a residence and even though it was new information, use of the beeper to get the information was no more a search for which a warrant is required than observation of the apartment from a neighboring building would have been. Indeed, the beepers told the agents less than such observation would have.

2. In any event, it is not necessary to address the use of beepers inside the apartment in order to conclude that the district court properly admitted evidence of petitioners' arrests, as well as evidence obtained during and subsequent to the arrests. There

[3] The circuits are also in agreement that beepers can be used to trace movements in public areas, although some require a showing of probable cause. Such a showing could easily be met in this case. Compare *United States* v. *Dubrofsky*, *supra*, with *United States* v. *Shovea*, 580 F. 2d 1382, 1387-1388 (10th Cir. 1978), cert. denied, No. 78-780 (Feb. 21, 1979); *United States* v. *Moore*, *supra*; *United States* v. *Frazier*, 538 F. 2d 1322, 1324 (8th Cir. 1976), cert. denied, 429 U.S. 1046 (1977). The Fifth Circuit has not yet resolved whether use of beepers is a search (see *United States* v. *Holmes*, 537 F. 2d 227 (1976) (affirming by equally divided court sitting en banc)), but has upheld their use in specific circumstances. *United States* v. *Pringle*, *supra*; *United States* v. *Perez*, *supra*.

was ample evidence independent of the beepers' signals to support these arrests. See *Wong Sun* v. *United States* 371 U.S. 471, 491 (1963); *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920).

At the time petitioner Botero and his companions drove up to the apartment and carried the cartons into it, the agents knew that the packages contained cocaine imported from Colombia and that the packages were addressed to petitioners, doing business as South American Imports. They also knew that earlier shipments to the company from Colombia, which had not been opened by Customs officials, had been picked up by either Cantalupo or Botero (Appellants' Opening Br. 8); that a number of person-to-person calls had been placed by both petitioners to one number in Bogota (*ibid.*); and that Botero had recently travelled to Colombia (*ibid.*). Finally, they knew that the apartment to which the parcels were delivered belonged to Cantalupo.

This information was more than sufficient to establish the probable cause needed to arrest Cantalupo and Botero for importing and distributing cocaine. Further, the timing of the arrests was justified independent of information received from the beeper, since Cantalupo was leaving the scene when he was arrested. And once he was arrested, the agents had to move to arrest anyone else remaining in the apartment, because such persons might have become suspicious when Cantalupo did not return, and might have hidden or destroyed evidence.

Since the arrests were supported by probable cause independent of information from the beepers, information derived from these arrests, including evidence about the appearance of the apartment at the time of the arrests, and evidence of fluorescent powder on petitioners' arms, was all properly admitted. Cf. *United States* v. *Moore*, *supra*, 562 F. 2d at 113-114.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1979

DOJ-1979-04